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IN THE

SUPREME COURT OF THE UNITED STATES

MOST REVEREND DAVID A. ZUBIK, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, ET AL.,

Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits

BRIEF FOR THE CATO INSTITUTE AND INDEPENDENT WOMEN'S FORUM AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The Court has granted certiorari to determine whether the so-called "accommodation" to the HHS-created contraceptive mandate (under the Affordable Care Act) violates the Religious Freedom Restoration Act, as applied to religious nonprofits. However, before engaging in RFRA analysis regarding whether the "accommodation" imposes a "substantial burden" on free exercise, or if it is "the least restrictive" means of achieving a "compelling government interest," the Court should consider three threshold questions that will simplify its task:

1. Does the ACA delegate to the Departments of HHS, Treasury, and Labor the authority to discriminate among religious nonprofits based on the unsupported and unsound conclusion that some religious employers "are more likely than other employers to employ people who are of the same faith"?

2. Whether, to avoid religious-entanglement concerns, the ACA should be read at *Chevron* Step One, *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), not to delegate the authority to the Departments to classify religious organizations based on bureaucratically guesstimated religiosity?

3. Whether the Departments, which lack "expertise" to answer this "major question" of social, "economic and political significance," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citations omitted), are entitled to judicial deference at *Chevron* Step Two?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, and files briefs. Cato has been indefatigable in its opposition to laws and regulations that go beyond constitutional or statutory authority, regardless of the underlying policy merits.

The Independent Women's Forum is a nonpartisan research and educational institution. IWF seeks women's advancement in today's marketplace and the full flourishing of human dignity through freedom and choice. IWF believes that gender equality and access to healthcare, including preventive services, are compelling government interests. IWF is concerned, however, that the contraception mandate disadvantages women by adversely affecting health and employment options and impinging on religious liberty.

Amici submit this brief to alert the Court to a complementary ground for resolving this case: If the Departments of HHS, Treasury, and Labor lack the interpretive authority and "expertise" to promulgate the religious accommodations at issue, their determinations are entitled to no judicial deference and indeed, are beyond the agencies' authority.

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[1] Rule 37 statements: All parties were timely notified and filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

Respondents have overstepped their bounds. Their decision that petitioners are *insufficiently religious* to warrant an exemption from the Affordable Care Act's "preventive care" mandate is bizarre and unprecedented. This determination—made by unqualified administrative agencies without *any* delegation from Congress—is *ultra vires*. This case can thus be resolved without further recourse to the Religious Freedom Restoration Act. Simply put, "[t]he idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation is not sustainable." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

In *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that regulations implementing the "preventive care" mandate violated RFRA for certain closely held corporations. 134 S. Ct. 2751, 2785 (2014). The cases here focus on the legality of another regulation promulgated under the same mandate that applies to certain religious nonprofits. This regulation, issued by the Departments of Health and Human Services ("HHS"), Labor, and Treasury (the "Departments"), requires nonprofits that the Departments consider insufficiently religious to merit exemption to comply with the preventive-care mandate by other means.

Before addressing RFRA or the First Amendment, the threshold question for the Court is whether the Departments had the requisite interpretive authority and "expertise" to issue this regulation that touches "major questions" of profound social, "economic and political significance." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*") (quoting

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000))).[2] Because they do not, the Respondents' determinations are invalid.

The ACA requires that all qualified employers provide "with respect to women preventive care as provided for by the Health Resources and Service Administration." 42 U.S.C. § 300gg-13(a)(4). Congress did not define what constitutes "preventive care." A subsidiary agency of HHS recommended that "preventive care" be interpreted to include all FDA-approved contraceptives. HHS agreed.

Facing a wave of public outrage, HHS belatedly acknowledged that its interpretation would force millions of religious believers to violate the teachings of their various faiths. In response, the Departments

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[2] *King*'s teaching on broader administrative-law principles is already resonating in the lower courts. *See* Reply of Movant-Intervenor Peabody Energy Corp. at 2, *West Virginia, v. EPA*, No. 15-1363 (D.C. Cir. Dec. 23, 2015), available at 1.usa.gov/1Z9ifP6 ("The Rule raises serious questions under the separation of powers because it represents agency lawmaking rather than interstitial rulemaking. Under *King v. Burwell*, EPA is not entitled to *Chevron* deference."); Amicus Curiae Brief of Int'l Center for Law & Economics and Administrative Law Scholars in Support of Petitioners at 3–4, *U.S. Telecom Ass'n v. FCC*, No. 15-1063, 2015 WL 4698404 (D.C. Cir. Aug. 6, 2015) (arguing that "the [Net Neutrality] Order should be rejected as exceeding the Commission's statutory authority and as presenting and addressing major questions—questions of 'deep economic and political significance,' see, e.g., *King v. Burwell* —that can only be addressed by Congress"). *See also* Leandra Lederman & Joseph C. Dugan, King v. Burwell: *What Does It Portend for* Chevron's *Domain?*, 2015 Pepp. L. Rev. 72, 73 (2015) ("[A]lthough *King* was an 'extraordinary case' for the Court, *Chevron's* heyday may be on the wane."); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 Pepp. L. Rev. 56 (2015).

adjusted their regulations. First, they exempted certain "religious employer[s]" from the contraceptive mandate altogether. This exemption was limited to houses of worship and their auxiliaries. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Second, other religious nonprofits the Departments deemed insufficiently religious to qualify for the exemption would receive an "accommodation." The Departments promulgated an alternative regulatory mechanism for these second-class religious nonprofits to comply with the mandate: employers were required to turn over information about their insurers to the government and execute instruments allowing their health plan to distribute contraceptives.

The Departments do not claim that RFRA compels either the exemption or the alternative compliance mechanism. Instead, they claim that 42 U.S.C. § 300gg-13(a)(4) and related provisions provide authority to decide which religious groups should be exempted and which "accommodated." The government concedes that the accommodation imposes, at least, a "minimal" burden on free exercise. 78 Fed. Reg. 39,869, 39,887 (July 2, 2013).

The Departments' alternative compliance regulation, however, is not authorized by the Affordable Care Act. No provision of that statute empowers the Departments to distinguish among religious nonprofits, exempting some while burdening others. Indeed, the statute does not authorize the Departments to burden the free exercise of *any* religious nonprofit. "It is especially unlikely that Congress would have delegated this decision to" the Departments, "which ha[ve] no expertise in crafting" religious accommodations "of

this sort" without clear statutory guidance. *King*, 135 S. Ct. at 2489 (citing *Gonzales*, 546 U.S. at 266–67).

The Departments' justifications for their discrimination among religious groups reflects their strange home-brewed approach to protecting religious exercise. The Departments concocted an exemption to houses of worship but not associated religious organizations based on the conclusory assertion that employees of the latter are "less likely" than the former "to share their employer's faith," 78 Fed. Reg. at 39,887 That HHS refused to exempt people who work for Petitioner Little Sisters of the Poor—a group of nuns who vow obedience to the Pope!—illustrates how out-of-their-league the Departments were in evaluating religiosity. Indeed, Congress expressly exempted nonprofits like Petitioners from the anti-discrimination provisions of Title VII. 42 U.S.C. §2000e-1(a). If they so choose, the Little Sisters of the Poor could *only* hire people of their own faith. Yet the Departments, with no basis, issued a blanket judgment that *all* religious nonprofits would have employees less likely to share their employers' religious beliefs.[3] There was not even an option for a case-by-case judgment.

Such haphazard and unauthorized guesswork by anonymous bureaucrats, in the face of longstanding congressional policy to the contrary, cannot justify such an infringement of religious freedom. The fact that the rulemaking was premised not on health, labor, or financial criteria, but on the Departments'

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[3] At the same time, the Departments removed from their regulations a requirement that houses of worship or their auxiliaries primarily employ people who share their faith to avail themselves of the exemption. *Id.* at 39,873.

own subjective evaluation about which employees more closely adhere to the religious views of their employers, "confirms that the authority claimed by" the Departments "is beyond [their] expertise and [is] incongruous with the [ACA's] statutory purposes and design." *Gonzales*, 546 U.S. at 267

Earnest and profound questions regarding "the mystery of human life," *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), are the quintessential "major questions" this Court has held Congress does not intend agencies to resolve absent clear delegation. *See Gonzales*, 546 U.S. at 266–67 ("The structure of the [Controlled Substances Act], then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise."). The Departments' attempt to force religious nonprofits to violate religious teaching regarding the start and nature of human life "lay[s] claim to an extravagant statutory power" affecting fundamental liberty interests—one the ACA simply does not grant. *UARG*, 134 S. Ct. at 2444.

ARGUMENT

I. The ACA Does Not Delegate to the Departments the Authority to Discriminate Among Religious Nonprofits

Before resolving the question of whether the Departments' alternative compliance regulation violates RFRA, the Court must first address whether the Departments have the authority to issue the regulation in the first place.

They do not.

The preventive-care mandate does not authorize unelected administrators to pick and choose which

religious nonprofits must violate their faiths' teachings and which not. This Court has made clear that such profound questions of religious teaching are not the sort of issues Congress cryptically delegates to federal agencies. *See Gonzales*, 546 U.S. at 266–67. Absent express delegation by Congress, the Departments simply have no power to force certain religious nonprofits to violate religious teaching, all the while exempting others. Any claim to the contrary is "not sustainable." *Id.*

A. The "Preventive Care" Mandate Does Not Authorize Discrimination Among Religious Nonprofits

Nothing in the ACA's text ACA authorizes the Departments to discriminate among religious groups.

To begin with, the drafters of the preventive-care mandate did not expect it to burden religious exercise at all. The ACA provides in relevant part that "with respect to women," an employer's group-health-insurance coverage must furnish "preventive care and screenings as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA)" without cost sharing. 42 U.S.C. § 300gg-13(a)(4). During the debate over this provision, the sponsors steadfastly insisted that the law would not implicate religiously-fraught questions about abortion and dismissed as unfounded any potential religious liberty concerns.[4]

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[4] For the history of § 300gg-13(a)(4), the "exemption," and the "accommodation," see Chapters 3 and 4 of Josh Blackman, Unraveled: Obamacare, Religious Liberty, and Executive Power (forthcoming 2016), manuscript available at bit.ly/1JxTdYn.

The conflict between the law and religious teaching was created by the Departments, not Congress. HHS developed its interpretation of "preventive care" by relying on a private group, the Institute of Medicine (IOM). *Hobby Lobby*, 134 S. Ct. at 2788 (Ginsburg, J., dissenting) (citing 77 Fed. Reg. 8725–8726). IOM's "experts," none of whom had any qualifications in religion or theology,[5] "determined that preventive coverage should include the 'full range' of FDA-approved contraceptive methods." *Id.*

That determination put religious nonprofits to the test of following their religious beliefs or violating the law. Following public outcry, the Departments adjusted the regulations. They exempted "religious employer[s]" from the mandate altogether, 76 Fed. Reg. at 46,623, while defining that category in a historically narrow fashion to include only churches and their integrated auxiliaries. 78 Fed. Reg. 39,874 (citing 26 U.S.C. §§ 6033(a)(3)(A)(i) or (iii)). Indeed, the Departments initially offered an even narrower definition, interpreting "religious employers" to include only those that "(1) [h]ave the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization." *Id.*[6] As the U.S.

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[5] Indeed, "religion," "faith," "conscience," and similar words appear nowhere in the 250-page report. Institute of Medicine, Clinical Preventive Services for Women (2011), bit.ly/1Z9hK7I. The dissent to the IOM report stated that the "process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." *Id.* at 232–33.

[6] The notice-and-comment period was deemed "impracticable, unnecessary, [and] contrary to the public interest" to ensure that college students could "benefit from the

Conference of Bishops noticed in a comment to the Departments, "even the ministry of Jesus and the early Christian Church would not qualify as 'religious' because they did not confine their ministry to their co-religionists or engage only in a preaching ministry." U.S. Conf. of Catholic Bishops, Comment Letter on Interim Final Rules on Preventive Services (Aug. 31, 2011), available at bit.ly/22OfdVn.

For the other religious nonprofits that HHS deemed insufficiently religious to qualify for the exemption, the Departments created an alternative regulatory mechanism to force compliance. The Departments ordered these non-church religious entities to turn over information about their insurers to the government and execute instruments allowing their health plan to distribute contraceptives.

The only reason given for the refusal to exempt religious nonprofits from the mandate? The Departments concluded that these nonprofit employers were insufficiently religious. *See* 78 Fed. Reg. at 39,887. That distinction appears nowhere in the text of the ACA and is wholly unsupported by any congressional policy.

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new prevention coverage" during the 2012–13 school year, rather than the 2013–14 school year." 76 Fed. Reg. at 46,624. Six months later, when the interim rule was finalized, HHS announced a "safe harbor" that would ultimately postpone enforcement of the mandate until December 31, 2013. News Release, U.S. Dep't of Health & Human Servs. (Jan. 20, 2012), available at bit.ly/1VOdQB4. This Court's orders in *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014), have stayed the mandate for this Petitioner since then.

B. Discrimination Among Religious Nonprofits Exceeds the Scope of the Departments' Delegated Authority

The Departments' so-called "accommodation" forces religious nonprofits to comply with the contraceptive mandate by other means, in violation of religious teaching. The Departments' decision that these religious employers must comply because they are not churches and thus insufficiently religious is far beyond the scope of the Departments' statutory authority. To be clear, the ACA authorizes HHS to make health-care related decisions, Treasury to make financial-related decision, and Labor to make employment-related decisions. 78 Fed. Reg. at 39,892. But neither the text, structure, or history of the ACA conveys even the slightest hint that agencies can make the delicate judgment to deny certain religious groups an exemption from a mandate that burdens their free exercise.

The Departments justified the religious-employer exemption on the grounds that "houses of worship and their integrated auxiliaries are *more likely* than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,887 (emphasis added). Other religious groups, like the Petitioners, received the accommodation because their employees "are *less likely* than individuals in plans of religious employers to share their employer's faith and objection to contraceptive coverage on religious grounds." *Id.* (emphasis added). This conclusory assertion—the *only* contemporaneous justification for this policy—serves as a testament to

how out-of-their-league the Departments are. Indeed, the government viewed Hosanna-Tabor with the same blinkered perspective: that church could not rely on the ministerial exception because it "decided to open its doors to the public" to students and teachers of other faiths. *See* Oral Arg. Tr. at 35–38, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2011) (No. 10-533). Such an arbitrary distinction, which this Court unanimously rejected, 132 S. Ct. at 706, is the antithesis of the rule of law.

Here, HHS has exempted houses of worship and "integrated auxiliaries" from the mandate while demanding that the Petitioners and other religious nonprofits comply by other means. Since the HHS rule turns merely on the organizational form of the religious entity, a nonprofit ministry may be penalized even as it engages *in precisely the same religious exercise* as an exempt "integrated auxiliary." This distinction between religious employers was made beyond any permissible scope of the Departments' interpretive authority.

Consider the organization of one of the petitioners. "Each Little Sister has chosen to follow Jesus Christ by taking lifetime vows to offer the poorest elderly of every race and religion a home where they will be welcomed as if they were Jesus himself, cared for as family, and treated with dignity until God calls them to his home." Complaint at 14, *Little Sisters of the Poor v. Sebelius*, 6 F Supp. 3d 1225 (D. Colo. 2013) (No. 13-cv-2611). To that end, the "Little Sisters have vowed obedience to the Pope, and thus obey the ethical teachings of the Catholic Church." *Id.* at 15. While the organization has lay employees and serves people outside the faith—just

like Hosanna-Tabor's school—the Little Sisters have personally taken an oath that expresses their clear moral opposition to the contraceptive mandate. In her declaration, Mother Loraine Marie Clare Maguire—the provincial superior of the Little Sisters—explained that the organization "filed a detailed public comment with the government to inform them of our sincere religious objection to incorporating us into their scheme. But the government refused to exempt us." Supp. Decl. of Mother Loraine Marie Clare Maguire at 17, *Little Sisters of the Poor v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013) (No. 13-cv-2611), available at bit.ly/1OQtXPp.

The Departments crudely bifurcated houses of worship and their associates, based on a supposition that people who work for the Little Sisters are less likely than lay church employees to adhere to the teachings of the Roman Catholic Church. There is no reason to think that the employees of nuns who compose the Little Sisters are any more likely to disobey church teachings than employees of the Catholic church proper. Indeed, Congress expressly exempted nonprofits like Petitioners from the anti-discrimination provisions of Title VII. 42 U.S.C. §2000e-1(a). If they so chose, the Little Sisters of the Poor could hire *only* people of their own faith. Yet the Departments, with no basis, issued a sweeping judgment that *all* religious nonprofits' employees are less likely to share their employers' beliefs.

Further, these employees deliberately chose to work for the Little Sisters and their ministry, which is dedicated to serving the church and its teachings—but not just in the context of worship. People of faith do not always (nor even often) practice their faith "in

that compartmentalized way." *Korte v. Sebelius*, 735 F.3d 654, 681 (10th Cir. 2013). That such ministries often serve real people with real needs does not make those ministries any less religious. Nor, again, does it mean that participants are any less likely to agree with church doctrine. Who is the executive branch to say that a particular organization lacks the "special solicitude" of a church, and does not warrant an exemption? *See* Oral Arg. Tr. at 57, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).

The government finds supports for the "accommodation" in a series of 80 statutes delegating authority to Treasury,[7] Labor,[8] and HHS.[9] 78 Fed. Reg. at 39,892. But in their combined nearly 90,000 words, these four-score provisions make absolutely no reference to religion. There are a handful of references to a "church plan" (which is defined under ERISA). The only conceivably relevant provision

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[7] 26 U.S.C. § 7805; 26 U.S.C. § 9833.

[8] 29 U.S.C. §§ 1002(16), 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c.

[9] 42 U.S.C. §§ 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, *26 U.S.C. § 36B*, and 31 U.S.C. § 9701. The last series of cited provisions in the ACA—42 U.S.C. §§ 300gg through 300gg-63, 300gg-91, and 300gg-92—are also cited as statutory authority for the exemption. *See* 76 Fed. Reg. at 46,626. With the exception of 300gg-13, none of these provisions have anything to do with the contraceptive mandate—and for many of them, the Departments lack the requisite interpretive authority anyway. For example, the Court ruled in *King* that Treasury lacked the "expertise" to broadly interpret 26 U.S.C. § 36B. 135 S. Ct. at 2489 (citing *Gonzales*, 546 U.S. at 266–67).

guarantees that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding conscience protection." 42 U.S.C. § 18023 (c)(2)(A)(i). If anything, this disclaimer suggests that Congress did *not* intend to delegate the power to burden conscience to the Departments.

In short, there is no indication that Congress intended the Departments to make *any* decisions regarding religiosity—much less to pick and choose among religious nonprofits. And with nothing approaching a clear statement, Respondents lack the requisite authority to make such significant determinations. *King*, 135 S. Ct. at 2489 (citations omitted). Congress could certainly choose to burden religious employers itself (subject of course to the limits of the First Amendment and RFRA), but such burdens become *ultra vires* when imposed by agencies with neither the authorization nor the expertise to act.[10] "It is especially unlikely that Congress would have delegated this decision to" HHS, Labor, and Treasury, "which ha[ve] no expertise in crafting" regulations on free exercise without any statutory guidance. *King*, 135 S. Ct. at 2489 (citing *Gonzales*, 546 U.S. at 266–67).

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[10] In their class complaint, Petitioner Little Sisters of the Poor charged that the accommodation was "arbitrary and capricious" under 5 U.S.C. § 706(2)(a), and "lacks legal authority." Complaint at 57–59, *Little Sisters of the Poor v. Sebelius*, 6 F Supp. 3d 1225 (D. Colo. 2013) (No. 13-cv-2611), available at bit.ly/1RcK4ac. The district court mentioned the issue, but did not rule on this basis. *Little Sisters of the Poor v. Sebelius*, 6 F. Supp. 3d 1225, 1233 (D. Co. 2013). The court of appeals didn't address these claims. *See Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015).

To be sure, federal agencies are obliged by both federal law and the Constitution to accommodate religious believers. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Goldman v. Weinberger*, 475 U.S. 503 (1986). What they may not do is pick and choose among religious adherents on the basis of their religiosity. It would be unthinkable, for example, for the Bureau of Prions to provide kosher meals to Orthodox Jewish prisoners because they are "more likely" to find these meals religiously necessary, but deny them to Reform Jewish prisoners who are "less likely" to adhere to these stringent dietary restrictions. *See United States v. Sec'y, Fla. Dep't of Corrections*, No. 12-22958, 2015 WL 1977795 at *14 (S.D. Fla. Apr. 30, 2015) ("RLUIPA requires consideration of the sincerity of the prisoner's belief, not whether a particular belief is supported by specific religious law or doctrine."). The government lacks the authority to favor true believers over casual observers—to determine the particular kinds of religiosity which warrants an exemption—but that is exactly what it has done here. It cannot be the rule of law that houses of worship receive the "full" exemption, while profoundly religious nonprofits like Petitioners receive "this sort of skim milk" accommodation. *See* Oral Arg. Tr. at 71, *United States v. Windsor*, 133 S. Ct. 2675 (2014) (No. 12-307).

C. The Departments Cannot Impose Arbitrary Burdens on Religious Nonprofits They Deem Insufficiently Religious

The courts below erred by conflating Congress and the Departments. For example, the Tenth Circuit explained that "the Government enjoys some

discretion in fashioning religious accommodations." *Little Sisters*, 794 F.3d at 1200. But who is "the Government"? RFRA certainly extends to an "agency," 42 U.S.C. § 2000bb-2(1), but the statute by itself doesn't somehow give that agency the expertise or competency to accommodate different religious entities on a sliding scale based on bureaucratic guesses about peoples' beliefs. The cases cited by the lower court involved congressional decisions, not executive agencies' "fashioning religious accommodations." *Little Sisters*, 794 F.3d at 1200.[11]

What is more, several of the courts below found unobjectionable the fact that "religious employers" are given an *exemption* to the contraceptive mandate, while other religious nonprofits only receive the *accommodation*: "The regulations at issue in this case draw on the tax code's distinction between houses of worship and religious non-profits, a 'longstanding and familiar' distinction in federal law." *Id.* at 1199 (citing *Priests for Life v. HHS*, 772 F.3d 229, 238 (D.C. Cir. 2014) and *Geneva Coll. v. HHS*, 778 F.3d 422, 443 (3d Cir. 2015)). This argument falters on several levels.

First, it was Congress that decided that churches "are automatically considered tax exempt and need not notify the government they are applying for recognition, but other religious non-profit

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[11] In *Cutter v. Wilkinson*, the Court stated that it "has long recognized that *the government* may accommodate religious practices without violating the Establishment Clause." 544 U.S. 709, 713 (2005) (citations omitted) (emphasis added). There too, "the government" referred to Congress, in the context of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 42 U.S.C. § 2000cc *et seq.*

organizations must apply for tax-exempt status if their annual gross receipts are more than $5,000." *Little Sisters*, 794 F.3d. at 1199–1200, (citing 26 U.S.C. §§ 508(a), (c)(1)(A)). This was not a decision the Treasury Department reached based on its own judgment about the nature of religious organizations and whether they must seek tax-exempt status.

Instead, it was the elected members of Congress who deliberated and determined that "churches, their integrated auxiliaries, and conventions or associations of churches" would receive an automatic "mandatory exception." *Id.* Indeed, "one might claim" a "background canon of interpretation" to the effect that decisions with enormous social consequences "should be made by democratically elected Members of Congress rather than by unelected agency administrators." *Brown & Williamson*, 529 U.S. at 190 (Breyer, J., dissenting).

Second, the analogy to tax exemption proves far more than the courts of appeals recognized. To qualify for tax-exempt status under I.R.C. § 501(c)(3), Form 1023-EZ asks the applicant to "attest that you are organized and operated exclusively to further the purposes indicated."[12] To answer this question, there are eight check boxes:

- ☐ Charitable
- ☐ Religious
- ☐ Education
- ☐ Scientific
- ☐ Literary
- ☐ Testing for public safety
- ☐ To foster national or international amateur sports competition
- ☐ Prevention of cruelty to children or animals

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[12] *See Form 1023-EZ, Streamlined Application for Recognition of Exemption Under 501(c)(3) of the Internal Revenue Code*, IRS, https://www.irs.gov/uac/About-Form-1023EZ (last updated Dec. 17, 2015).

An organization seeking to establish a nonprofit that furthers a religious purpose has one job: check "☑ Religious." That's it. Applicants do not need to prove to the satisfaction of an anonymous official that they are "more likely than other [religious] employers to employ people who are of the same faith and/or adhere to the same objection." 78 Fed. Reg. at 39,887. All they have to do is check a box, an action that in no way impacts their rights to free exercise of religion—as Petitioners readily accept.[13]

Third, the lower court's invocation of the "distinction between houses of worship and religious non-profits, [as] a 'longstanding and familiar' distinction in federal law," *Little Sisters*, 794 F.3d. at 1199 (citations omitted), suffers from a fatal error. Regardless of whether a house of worship qualifies for the automatic exemption, or a religious nonprofit checks the "Religious" box, the outcome is *exactly the same*: both receive full tax exemption.[14] That

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[13] Form 1023-EZ provides a simple limiting principle for this case. Any organization that has received tax-exempt status by checking "☑ Religious" should be automatically exempted from the "preventive care" mandate. There would be no need to inquire about religiosity or draw new lines. Additionally, the government can determine which organizations are exempt based on readily-available IRS filings. These organizations would not have to take any additional steps to opt out.

[14] In certain respects, Congress—and not the Treasury Department—has bestowed special benefits on houses of worship, such as allowing automatic tax exemption, not requiring the filing of tax file returns, and imposing restrictions on audits. 26 U.S.C. § 711. Once religious nonprofits push the right papers, however, they receive the same tax treatment. The lack of certain administrative conveniences for religious nonprofits does not substantially burden their rights of free exercise, as does the self-certification at issue here.

Congress imposed such a simple requirement for tax exemption, but the Departments unilaterally imposed an unprecedented burden for the mandate exemption, is indefensible.[15] It would be a drastic step to assume that Congress asked the Departments to pick and choose which religious groups—churches yes, nuns no—can be exempted from the mandate. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.").

Consider a hypothetical. What if the Treasury Department concluded that the missions of certain religious nonprofits—but not houses of worship—were too attenuated from congressional design for tax-exempt status to warrant *full* exemption? As a result, Treasury determines that some such applicants are insufficiently religious, or that their structure was not conducive to attracting a critical

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[15] See Oral Arg. Tr. at 56–57, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356):

> JUSTICE KENNEDY: Now, what -- what kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined? I recognize delegation of powers rules are somewhat moribund insofar as their enforcement in this Court. But when we have a First Amendment issue of this consequence, shouldn't we indicate that it's for the Congress, not the agency, to determine that this corporation gets the exemption on that one, and not even for RFRA purposes, for other purposes?

mass of employees that shared their faith. As a result, the IRS fashions a new *accommodation*: the nonprofit would not have to file federal tax returns, but donations would not be tax-deductible. Sure, the collection plate may be a bit lighter, the government would argue, but the institution itself would not be burdened by having to file the returns.

Such a defense "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring). In the absence of any sort of affirmative statement from Congress, the Departments are utterly incapable of picking and choosing which organizations are sufficiently religious to warrant preferential treatment. Yet that is exactly what the government argues here—except the repercussions are *eternally* worse for the Petitioners. Literally. The lack of tax-exempt-donations pales by ecclesiastical orders of magnitude in comparison with the complicity-in-sin that is the basis for the Petitioners' objection to the mandate.

D. The Departments' Justifications for Discriminating Among Religious Nonprofits Reflects Their Blinkered Approach to Protecting Religious Liberty

Through the bifurcation of different religious organizations, the agencies are "laying claim to an extravagant statutory power" affecting fundamental religious liberties—a power that the ACA "is not designed to grant." *UARG*, 134 S. Ct. at 2444. The basis of the distinction between the exemption and accommodation is a delicate, value-laden judgment, one that cannot be made within the permissible bounds of the Departments' interpretive authority.

Accordingly, the Departments' discovery of this "unheralded power" to decide which religious groups should and should not be exempted from a regulatory mandate that burdens religion, must be "greet[ed] with a measure of skepticism." *Id.* The controversial contraceptive mandate, akin to the contentious "issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country, makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U.S. at 267 (citing *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

To find that Section 300gg-13(a)(4) in particular affords the Departments the interpretive authority to balance religious liberty and public health, "one must not only adopt an extremely" broad interpretation of what providing "preventive care" entails, "but also ignore the plain implication of Congress's" long-standing commitment to the protection of religious liberty. *Brown & Williamson*, 529 U.S. at 160. *See United States v. Lee*, 455 U.S. 252, 260 (1982) ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."). Had Congress intended to give the Departments discretion to decide which religious institutions should be subject to the mandate, it would have legislated to that effect. The fact that text and history of 42 U.S.C. § 300gg-13 are entirely silent on the issue should be dispositive proof that the agencies lacked the interpretive authority to craft the regulations in the manner they did.

The fact that the rulemaking here was premised not on health, financial, or labor-related criteria, but

on subjective determinations of which employees more closely adhere to their employers' religious views, "confirms that the authority claimed by" the Departments "is beyond [their] expertise and incongruous with the statutory purposes and design." *Gonzales*, 546 U.S. at 267 If "Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

E. The Accommodation Fails to Respect the Departments' Narrowly Circumscribed Role in Avoiding Free-Exercise Burdens

There is an air of déjà vu to this case. This is not the first time that the Executive Branch has sought to narrowly define what it means to be religious.

In 1977, three years after ERISA's enactment, the IRS general counsel concluded that an unnamed religious order of nuns, referred to as "the Sisters," were ineligible to have a "church plan." *See* IRS Gen. Counsel Memo 37266, 1977 WL 46200 (Sept. 22, 1977).[16] At the time, 26 U.S.C. § 414(e) provided that only a retirement "plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501" would qualify for a "church plan." *Id.* at *2. The general counsel recognized that "neither the Code nor the Regulations defines the term 'church,'" so the agency had discretion to interpret the statute. *Id.* at *3. Based on its study of the Internal Revenue "Code, Committee Reports, and Regulations," the general counsel found that

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[16] The IRS redacted the order's name, but the description is quite similar to duties performed by the Little Sisters of the Poor. IRS Gen. Counsel Memo 37266, 1977 WL 46200, at *1–2.

"'carrying out the functions of a church' means carrying out the religious functions of the church," and that "operating hospitals is not a religious function." *Id.* at *5.

Congress disagreed. Three years later, "[w]ith the support of a broad-based coalition of religious organizations, Congress retroactively amended and expanded the church plan exemption." *Overall v. Ascension*, 23 F. Supp. 3d 816, 826 (E.D. Mich. 2014) (citing 94 Stat. 1208 (1980)). The new statute rejected the IRS's "narrow[]" interpretation that "include[d] only church organizations if they were focused on worshipful or priestly activities." *Id.* at 825–26. Congress instead specified that an organization "is associated with a church if it shares common religious bonds and convictions with that church." 26 U.S.C. § 414(e)(3)(D). This inclusive definition would include groups like the Petitioners.

In 1983, the IRS general counsel published a memorandum departing from its 1977 opinion. Once again, another unnamed order of charitable nuns requested to have its retirement plan, which covered "lay employees of [the] religious order," qualified as a "church plan" and exempt from ERISA. IRS Gen. Counsel Memo 39007, 1983 WL 197946, at *1 (July 1, 1983). Under the revised statute, the IRS found that "the sisters are 'associated with' the Catholic Church by reason of sharing 'common religious bonds and convictions,'" so an employee "is considered as an employee of the Roman Catholic Church of the United States for purposes of the church plan rules." *Id.* at *4. As a result, the employees of the order were "eligible for coverage by a church plan." *Id.* at *6.

This history teaches two important lessons about the relationship between Congress, executive agencies, and the accommodation of religious liberty. First, the Treasury Department in 1977 denied the nuns' initial request to have a "church plan," relying on its statutory discretion to interpret the word "church" narrowly. Through this language, Congress delegated the authority to decide what is and is not a church. But this delegation was set against the background principles that this issue was of great social, political, and economic significance. This was not a quotidian regulatory decision, but one that had the effect of burdening religious organizations.

Second, even with such a delegation, Congress has always retained the authority to avoid an "unjustified invasion" of "churches and their religious activities." S. Rep. No. 93-383, at 81 (1973) (Senate Report concerning ERISA). Through the political process, compromises were made that balanced the promotion of retirement benefits with the protection of religious liberty. *See also Gillette v. United States*, 401 U.S. 437, 445 (1971) (contrasting Congress's "deep concern for the situation of conscientious objectors to war" with "countervailing considerations, which are also the concern of Congress."). This sort of deliberation did not happen with the rulemaking process that led to the "accommodation" here. Finally, there is absolutely nothing in the history of the ACA to suggest Congress thought the "preventive care" mandate would give rise to *any* tensions with free exercise. Rather, its sponsors steadfastly insisted that the law would not implicate religiously-fraught questions about abortion and dismissed as unfounded any potential religious-liberty concerns. *See supra* note 4.

When Petitioners applied for tax-exempt status, Congress crafted a simple standard to assess their religiosity: agnosticism. See *Appeal of Unity Sch. of Christianity*, 4 B.T.A. 61, 70 (Board of Tax Appeals 1926). For an exemption to the contraceptive mandate, the criteria can be no less.

II. The Departments' Claimed Authority to Monitor Religiosity Creates Significant Entanglement Concerns

The Court should read the ACA in the only way it can be read—as delegating *no* authority to the Departments to classify religious organizations based on bureaucratically guesstimated religiosity. Doing so would not only be consistent with congressional design, but would avoid potentially serious constitutional questions. *See Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) ("*SWANCC*") ("As an agency, it may not construe an ambiguous statute so as to raise serious constitutional doubts."). This avoidance doctrine stems from a two-fold concern: First, the "prudential desire not to needlessly reach constitutional issues." *Id.* at 172. Second, the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172–73. Thomas W Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 914 (2001) (describing the Court's approach in *SWANCC* as endorsing the "avoidance of questions cannon, and [holding] that this canon displaces the *Chevron* doctrine").

The entanglement concerns are inescapable when the government distinguishes among religious groups. *Christian Univ. v. Weaver*, 534 F.3d 1245,

1249 (10th Cir. 2008) (McConnell, J.) ("[T]hat logic will not save a law that discriminates among religious institutions on the basis of the pervasiveness or *intensity of their belief*.") (emphasis added). Not so long ago, the United States recognized in the employment-law context the dangers of "allow[ing] houses of worship [an exemption], but deny[ing] equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets." Gov't Amicus Br. at 11, *Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2008) (No. 08-35532), 2008 WL 5549423 (emphasis added). The assistant attorney general explained there that "discriminating among religious groups would create a serious Establishment Clause problem There appear to be numerous, organizations, across a broad spectrum of faiths, that are organized for a religious purpose and have sincerely-held religious tenets, but are not houses of worship." *Id.*

The Court has long held that when an agency interprets a statute in a way that raises constitutional doubts, that interpretation must be supported by a "clear indication" and an "affirmative intention" of congressional design. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a *clear indication* that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)) (emphasis added); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) ("In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious

constitutional questions. If so, we must first identify 'the *affirmative intention* of the Congress clearly expressed' before concluding that the Act grants jurisdiction.") (emphasis in added); *Lowe v. SEC*, 472 U.S. 181, 216 (1985) (White, J., concurring). ("In cases where the policy of constitutional avoidance must be considered the administrative construction cannot be decisive.").[17]

Congress in no way, shape, or form delegated to HHS the authority to regulate religion—much less to make untenable distinctions among religious groups. Nowhere in the 900+ page ACA, or anywhere in its legislative history, is there any reference to any agency determining whether a religious ministry and its employees are sufficiently religious to merit protection—much less a congressional delegation involving the "specific provision" and "particular question" at issue here. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C. J., dissenting) (citation omitted). The government cannot point to *any* "legislative delegation to [the Departments] on a particular question [involving religiosity]." *Id.* (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) (emphasis in original).

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[17] *See also* Merrill & Hickman, *supra* at 914 (2001) ("Thus, there can be no doubt that *Chevron* deference must give way when the agency's policy, although consistent with the statute and otherwise permissible in light of the statutory language and purpose, impinges upon principles that the Court has discerned in the Constitution."); Jonathan D. Urick, Note, Chevron *and Constitutional Doubt*, 99 Va. L. Rev. 375, 377, 392–408 (2013) ("[B]y the time *Chevron* was decided, there was a plausible background understanding that constitutional avoidance displaces judicial deference to administrative statutory interpretation.").

In contrast, consider 26 U.S.C. § 5000A(d)(2), wherein Congress spelled out in great detail how religious objectors could receive an exemption from the individual mandate. When Congress anticipated that its mandates would infringe on religious liberty, it spoke very clearly. *See also* Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion, Exec. Order No. 13535 (Mar. 24, 2010) ("Under the Act, longstanding Federal laws to protect conscience (such as the Church Amendment, and the Weldon Amendment) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.").

As the government recently reminded the Court in *King v. Burwell*, the doctrine of constitutional avoidance is among the traditional tools of statutory interpretation employed at *Chevron*'s first step. Oral Arg. Tr. at 49–50, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) (Verrilli: "Well, what I was going to say, Justice Kennedy, is to the extent the Court believes that this is a serious constitutional question and this does rise to the level of something approaching coercion, then I do think the doctrine of constitutional avoidance becomes another very powerful reason to read the statutory text our way."). The doctrine of constitutional avoidance requires this Court to reject the Departments' view of the ACA as license to pick and choose among religious nonprofits. Because there is not so much as a mention of religion in that provision—much less a "clear indication" that Congress intended to delegate to the Departments' the authority to discriminate

among religious groups—this Court should reject that unprecedented assertion of authority.

III. The Departments, Which Lack "Expertise" to Answer This "Major Question" of Social, "Economic and Political Significance," Are Not Entitled to Deference

Even if the Departments have the authority to pick and choose among religious nonprofits (they do not), they would not receive deference for the so-called "accommodation." *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King v. Burwell*, 135 S. Ct. at 2488 (quoting *Brown & Williamson*, 529 U.S. at 159). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* There is no such delegation in this case.

The Departments' determination that some religious nonprofits are insufficiently religious to merit an exemption, is the quintessential "major question" of profound social, "economic and political significance." *Brown & Williamson*, 529 U.S. at 1315. Even if the "preventive care" mandate is ambiguous here, the accommodation cannot possibly be a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. "The idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation in the" broad purposes of the ACA "is not sustainable." *Gonzales*, 546 U.S. at 266–67. The accommodation "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

In light of the narrow "breadth of the authority" that Congress has afforded to the Departments over this controversial issue of religious liberty, the Court is not "obliged to defer to the agency's expansive construction of the statute." *Brown & Williamson*, 529 U.S. at 160. This is especially true since the Departments lack the "expertise" to make such a decision in the first instance. *King*, 135 S. Ct. at 2489 (citing *UARG*, 134 S. Ct. at 2444). *Cf. Gonzales*, 546 U.S. at 266–67 ("The structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.")).

The only possible textual hook supporting the accommodation is the phrase "preventive care." 42 U.S.C. § 300gg-13(a)(4). But this term has nothing to do with religion; it supplies no intelligible principle that allows the Departments to tinker with religious accommodations—among the more finely tuned and controversial compromises leading to the ACA's enactment.[18] The ACA's text should leave this Court "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160. *See also MCI v. AT&T*, 512 U.S. 218, 231 (1994) (Congress does not usually delegate "enormous" questions).

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[18] Brief of Democrats for Life of America and Bart Stupak as *Amici Curiae* in Support of *Hobby Lobby* and *Conestoga, et al*, 13-354 & 13-356 (2014), at 1-3 (Pro-Life Caucus "offered means by which [ACA] could ensure comprehensive health-care coverage while respecting unborn life and the conscience of individuals and organizations opposed to abortion"); Josh Blackman, Unprecedented: The Constitutional Challenge to Obamacare 70, 75 (2013) (discussing how protection of conscience was crucial to ACA's enactment).

As then-Judge Breyer explained three decades ago, in such situations, "[a] court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). The "interstitial matter" of which forms of birth control constitute "preventive care" does not embrace the far broader "major question" of which religious organizations should and should not be exempted from a regulatory mandate that violates RFRA, or how others should be accommodated. This is "an inquiry familiar to the courts: interpreting a federal statute to determine whether executive action is authorized by, or otherwise consistent with, the enactment." *Gonzales*, 546 U.S. at 249. *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (providing that agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review").

Further, neither the express delegation to interpret "preventive care," nor the broad goals of improving "public health" and "gender equality," *Hobby Lobby*, 134 S. Ct. at 2779, can be used to justify a great substantive and independent power over free exercise. Because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v.*

Am. Trucking Ass'ns., Inc., 531 U.S. 457, 468 (2001), the Departments cannot alter the fundamental aspects of religious accommodation based on the ACA's purposes. The narrow source of their statutory authority—which offers no religious exemptions for providing "preventive care"—could not hide a mouse, let alone the woolly mammoth that is religious liberty. *Id.*

In *Brown & Williamson*, the Court recognized that "[i]n extraordinary cases there may be reason to hesitate before concluding that Congress has intended an implicit delegation." 529 U.S. at 159. If the FDA's attempt to regulate tobacco, which has "its own unique political history," was "extraordinary," then the Departments' decision to bifurcate religious groups on profound questions of conscience is beyond the pale. Surely religious freedom is more important to Congress—and to the nation as a whole—than the regulation of snuff. Deciding which religious groups should and should not be exempt from the contraceptive mandate, and how others should be accommodated, is "not a case for" HHS, Labor, and Treasury. *King*, 135 S. Ct. at 2489. "Congress' consistent judgment" must trump the Departments ill-equipped attempt to minimize burdens on free exercise. *Brown & Williamson*, 529 U.S. at 160.

CONCLUSION

The decisions of the courts below should be reversed.

Respectfully submitted,

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